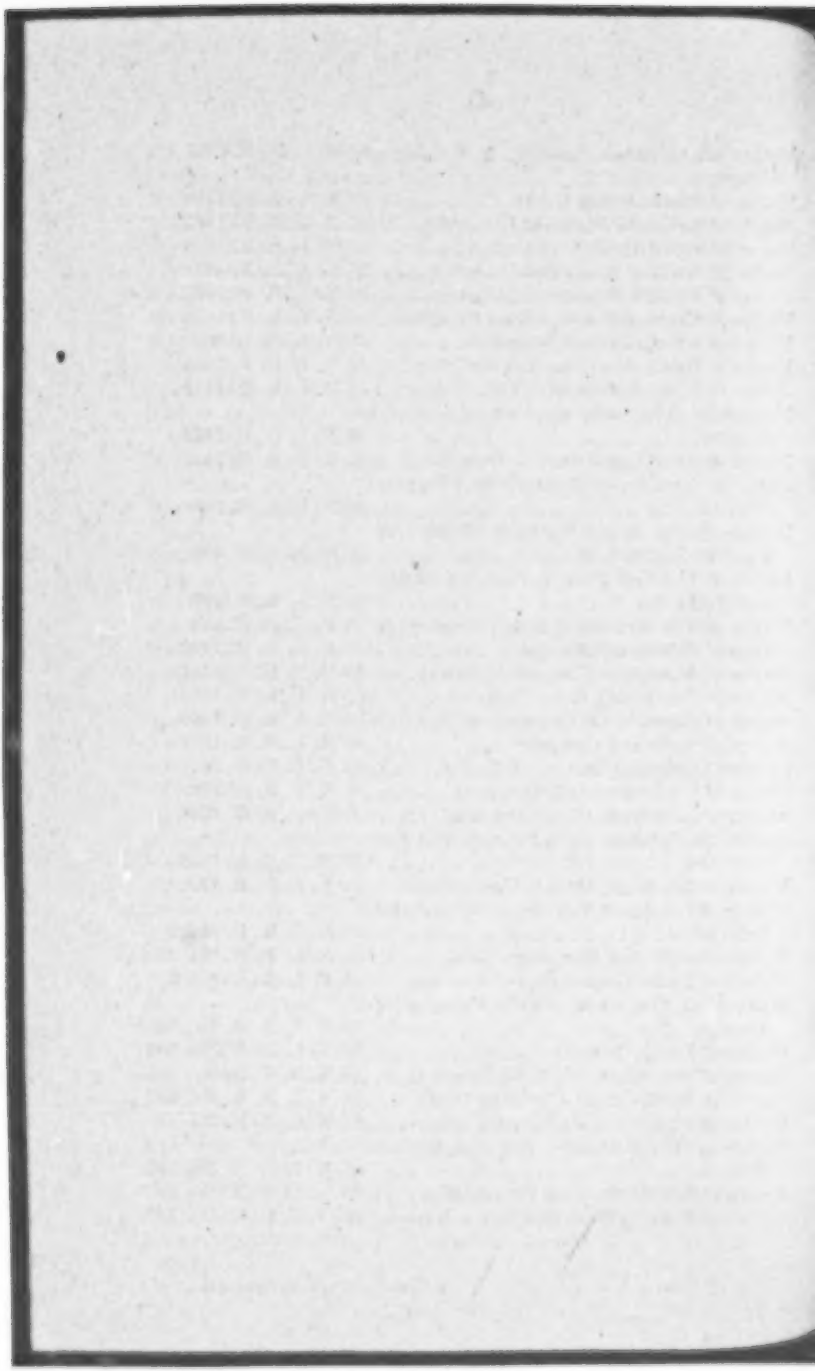

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United States of America

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 1236

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
vs.
FEDERAL MOTOR TRUCK COMPANY

BRIEF OF FEDERAL MOTOR TRUCK COMPANY OPPOSING ISSUANCE OF WRIT OF CERTIORARI

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I.

QUESTION PRESENTED

We do not agree with counsel for the Board in their statement (p. 3 of the petition) that

> "2. The question presented by the Federal Motor Truck * * * cases is whether the Board, in the exercise of its administrative discretion, may properly require an employer in time of war to bargain collectively with a labor organization as

> the representative of the employer's plant protection employees when those employees are members of the Auxiliary Military Police of the Army of the United States, and when the labor organization which represents them also represents a separate bargaining unit composed of the employer's maintenance and production employees."

As the Sixth Circuit properly said in the concluding paragraph of its opinion (p. 723):

> "Confining ourselves to the facts of these particular cases, we conclude for the reasons indicated, that the applications to enforce the orders under review should be, and they are, therefore denied."

The Sixth Circuit only decided this matter as it applied to the peculiar facts of the Federal case.

There is nowhere in the Record here any proof that the records in any of the other militarized plant guard cases to which counsel refer, except the companion case in the Sixth Circuit of Jones and Laughlin Steel Corporation, contain all the facts, the same facts and only the facts found in the Federal record.

The real question in the instant case is whether the Sixth Circuit properly refused to enforce the Board's order, the Board having failed to find that it would be in the public interest to carve out the proposed unit and the Board having failed to find that it would be in the public interest to compel Federal to bargain with the proposed representative of the unit under the facts of the case, the Court concluding that the public interest is to the contrary.

II.

REASONS FOR DENIAL OF PETITION

We respectfully submit that certiorari should be denied.

1.

The decision of the Sixth Circuit is not in conflict with at of any other Circuit Court of Appeals.

It did not hold that the guard force were not employees thin the meaning of the National Labor Relations Act.

All the Sixth Circuit held in the Federal case (146 Fed. 718) was that "the Board failed to give adequate con-leration to the national welfare and this is a funda-ental error" (p. 721) in requiring the Company to col-ctively bargain on behalf of its militarized plant pro-ction force with the United Automobile, Aircraft and gricultural Implement Workers of America, the same bor organization as has a bargaining contract for the mpany's production and maintenance employees.

No other Circuit Court of Appeals has held to the con-ary. Rather, the Circuit Court of Appeals for the venth Circuit in another militarized plant protection rce case, *N.L.R.B. v. E. C. Atkins & Co.*, 147 Fed. 2d 0, said (p. 742):

> "A more cogent reason, however, why enforcement should not be allowed is that to do so would be or is likely to be inimical to the public welfare."

he Seventh Circuit in its opinion, continues by referring the conclusion of the Sixth Circuit in the instant case d stating that it agrees with it (p. 742).

Moreover, the Circuit Court of Appeals for the Fifth Circuit, in *Jones and Laughlin Steel Corporation v. N.L.R.B.*, 146 F. 2nd 833, placed its stamp of approval on the reasoning of the instant case when it said (p. 834):

> "• • • Doubtless other established public policies and interests ought also to be considered, as was recently held in the Sixth Circuit in *National Labor Relations Board v. Jones and Laughlin Steel Corporation*, 146 Fed. 2d 718."

(The *Jones and Laughlin* Sixth Circuit case was a companion case of the instant case, a joint opinion having been rendered.)

2.

There is no important question of federal law involved to be settled by this Court in this case.

a. Counsel would have you believe that the unresolved issue here is whether a court has the right to demand that the Board consider the national welfare. This Court has answered that question a number of times in the affirmative. Thus in *Southern Steamship Co. v. N.L.R.B.*, 316 U. S. 31, 47, it said:

> "It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives."

Similarly, in *Phelps Dodge Corp. v. N.L.R.B.*, 313 U. S. 177, this Court refused to put its stamp of approval on the conclusion of the Board that it was in furtherance of the Act and of public policy to order back pay when the employee had made no attempt to secure employment.

In *N.L.R.B. v. Fansteel Metallurgical Corp.*, 306 U. S. 240, this Court reversed the Board's conclusion that those who disobey the law by indulging in sit down strikes continue as employees within the meaning of the Act.

In *N.L.R.B. v. Indiana Michigan Electric Co.*, 318 U. S. 9, another case from the Sixth Circuit, this Court held that the Board had abused its discretion in refusing to allow testimony to be taken as to certain dynamiting of the employer's property and that it was in the interest of public policy for the "courts and administrative bodies (to) so employ their discretion as to dispel any belief that use of dynamite will advance legal remedies."

b. In considering the policy of the Act and applying that policy to the facts as found by the Board, the Sixth Circuit but followed the language of this Court in *N.L.R.B. v. Penn. Greyhound Lines, Inc.*, 303 U. S. 261, 625:

> "* * * Hence, upon the challenge of the affirmative part of an order of the Board, we look to the Act itself, read in the light of its history, to ascertain its policy, and to the facts which the Board has found, to see whether they afford a basis for its judgment that the action ordered is an appropriate means of carrying out that policy."

c. Nor did the Sixth Circuit go contrary to the yardtick laid down by this Court in making its determination that the unit proposed by the Board was not in the public interest. In *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U. S. 146, 165, this Court said:

> "* * * As a standard, the Board must comply, also, with the requirement that the unit selected must be one to effectuate the policy of the Act, *the policy of efficient collective bargaining*" (italics ours).

3.

The decision of the Sixth Circuit does not mean, as counsel argue on pages 25 and 26 of their brief, that the alleged policy of the Board as to militarized plant protection employees is overturned. But first let us point out that in connection with this argument counsel go outside the record in the Federal case and recite how many militarized plant guards there are, etc. However, the answer to the argument is that if the Board believes it can get facts into a case substantiating its alleged policy, then it should do so and make proper findings upon such facts. There are no such facts in the Federal record and no such findings. The Federal decision, as the Court expressly states in the concluding paragraph of its opinion, applies only to the facts in the Federal case.

III.

ANSWERING BOARD'S ARGUMENTS IN PETITION

1.

A considerable part of counsels' argument is premised upon findings made by the Board in other cases decided by it. Those findings necessarily must have been based upon the facts of those cases. Whether those facts are the same as the facts in the Federal case, we do not know. Nor are we bound to make that determination. Facts known to a commission but not put in evidence will not support an order. *Chicago Junction Case,* 264 U. S. 258; *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio,* 301 U. S. 292.

2.

Another considerable portion of counsels' argument is based upon Circular No. 15 issued by the Headquarters of the Army Service Forces. There are numerous conclusive answers.

a. On p. 12 of the petition, counsel erroneously state that "Upon the basis of the War Department regulations * * * the Board found * * *." But that is not true because the only reference made by the Board in the Federal case to any regulation of the Army is that "A bulletin issued by the Army authorities with regard to the regulations of military police recites that 'basically, the militarization of plant guard forces does not change the existing systems of hiring, compensation, and dismissal; all remain primarily a matter between the guards and the plant management.'" This reference is in the Board's "Decision and Direction of Election." The "Decision and Order" of the Board in the unfair labor practice case—the instant matter—makes no mention of it.

b. Furthermore, it is not for the Army to decide whether or not public interest is satisfied by requiring an employer to collectively bargain with a unit of militarized plant protection men. That is a question of law. That is the duty of the Board in the first instance, with the Court having the right to determine whether the Board in making such a determination went beyond the limits of its discretion.

c. There is no proof in this record nor finding of the Board of any clear cut determination by the military authorities.

Section 6 h (2) of the circular does not prove, as the Board claims, that the military authorities view the col-

lective bargaining relationship as one appropriate to the status of plant protection employees and consistent with their security functions. The regulation only states that plant protection employees "are permitted to bargain collectively * * *. In view of recent decisions of the National Labor Relations Board," referring to the *Lord Manufacturing Company* case, 47 N.L.R.B. 1032.

Nor does the circular provide that the requirements of security are fully met when there is a separate unit of a plant protection force. Rather, the N.L.R.B. having held that members of a plant protection force constitute an appropriate unit for collective bargaining, the Army merely stated that the unit should be separate from that of rank and file employees. Therefore, it cannot be concluded, as the Board argues, that the unit is shaped in accordance with the views of the security authorities, if by that statement the Board means that the Army believes that a unit of plant protection employees effectuates the policies of the Act.

It must follow that the Sixth Circuit, although it has the right to do so, has not substituted its judgment for that of the military authorities.

d. An examination of the *Lord Manufacturing Company* decision of the Board, cited by the Army in the circular, shows that no claim was made by anyone in that case that the company should not have been required to bargain collectively as to its plant protection employees. Rather, Union A petitioned to be certified as the bargaining agency for the plant guards while the Company and Union B contended that certification should be denied due to the fact that the latter union and the company had a contract covering production employees as well as plant guards. The Board directed that an election be held to determine whether the plant guards desired to be repre-

sented by Union A in a unit comprised only of plant guards.

The three cases cited by the Board in the *Lord* case are *Chrysler Corp.*, 44 N.L.R.B. 881; *U. S. Electrical Motors, Inc.*, 45 N.L.R.B. 298; and *Julius Petersen et al.*, 46 N.L.R.B. 1049. In no one of these three cases did the Board find that public interest would be effectuated by requiring bargaining with a unit composed of plant protection employees. In the *Chysler* case, the Company urged that plant protection employees were instruments of management and should be precluded from a bargaining unit. In the *U. S. Electrical Motors, Inc.* case, plant protection employees were excluded from a unit of production and maintenance employees on the ground that there was no past precedent of bargaining between the Company and its employees including watchmen and because of the "present conditions of the plant"—the Company being in the production of war goods and the guards having been inducted as civilian members of the Auxiliary Military Police. In the *Julius Petersen* case, plant protection employees in plants producing war work were excluded from units of production employees and included in a bargaining unit restricted to employees of their own class.

3.

On pages 20 and 24 of their brief, counsel improperly attempt to state the view of the Sixth Circuit when counsel say "In the court's view such a bargaining pattern 'might' result in a conflict of personal interests * * *." The opinion of the Sixth Circuit unequivocally states (p. 721):

> "We think that in each order under review the Board failed to give adequate consideration to the national welfare and this is a fundamental error."

The opinion does say that "It is manifest that these personal interests of the bargainors, as well as the demands made upon them either by the employees or employers might necessarily constitute a serious and embarrassing handicap when it came to the consideration of the interest of the public. When these particular Unions were selected as bargaining agents for the plant protection employees, these employees might in an effort to discharge their duty to their employers find themselves in conflict with other members of their Union over the enforcement of some rule or regulation they were hired to enforce; or upon the other hand, in conflict with the Federal Government because of fealty to the Union at the time of a dispute involving the public interest. We think that the imposition of such strains upon personal allegiance and personal interest would undoubtedly be detrimental to the public interest and to the free flow of commerce" (pp. 722, 723). The word "might," when read in connection with what the Court said in using the word, and in connection with the entire opinion, can leave no doubt that the Court has not indulged in conjectures and guesses as counsel charge.

IV.

OTHER QUESTIONS INVOLVED IF CERTIORARI IS GRANTED

A.

If certiorari should be granted, Federal agrees with the Board that the matter referred to in the first paragraph of the footnote on page 13 of the petition should be retained in the case. We urge the question there involved should dispose of the case. The Sixth Circuit did not pass on it.

When the members of Federal's militarized plant protection force joined the International a collective bargaining agreement was in effect between the International Union, U.A.W.-C.I.O., and Local 174 and Federal in which it was agreed that certain classifications of employees should be excluded, including plant protection, and

> "• • • that the Union will not solicit or accept the same for membership."

A subsequent contract between the parties, now in effect, contains the same language.

The International thus is under contract with Federal not to accept the plant protection force into membership. This means, of course, that it has agreed not to represent them for collective bargaining purposes.

The record clearly shows that Local 114, the one involved in the present proceedings, is a Local of the International.

The record further shows that Article 18 of the constitution of the International provides—

> "Section 1. It shall be the established policy of the International Union to recognize the spirit, the intent and terms of all contractual obligations developed and existing between Local Unions and employers, concluded out of conferences between the Local Union and the employers, as binding upon them. Each Local Union shall be required to carry out the provisions of contracts so negotiated."

The Locals are therefore bound to carry out such a contract as this one and so is the International.

It is argued by the Board that it would offend the policy of the law to compel the International, or its subordinate Local, to decline to act as a representative solely

because it has bargained not to do so. It is said that a contract with an employer which "renders abortive the exercise of that right" has no statutory standing and it is urged that when a Union "is willing to represent employees, a majority of whom in an appropriate unit have designated it, the statute requires that it be treated as a bargaining agent * * *." There is no provision in the Act that prevents any person who is selected as a representative by any number of employees from refusing to act as such. The argument of the Board would lead to the absurd conclusion that in case employees selected a Union or an organization or an individual, which did not wish to act, or which, because of some defect of power, could not act, it was still compelled to act. This cannot be true. The right of collective bargaining and the exercise of full freedom of designation would not be abridged by such a refusal. Even granted that the employees must have full freedom of choice, they still must choose a qualified representative, one who can act and one who will act.

If this plant protection force had chosen a representative who then declined to act, such for instance as a carpenter's union, there is nothing in the law or in the policy as there expressed that could compel that individual or agency to accept the appointment. It could reject it and the force would have no remedy to compel it to accept it. The fact that in this case the International, by its agreement made before the selection, has said that it and its Locals would not act, and thus rejected the appointment before it was chosen, makes no difference. It is precisely in the situation as if it had rejected the appointment after its selection.

There is, then, no interference with the policy of the Act. The members of the plant protection force, if in fact

they are entitled to be treated as a bargaining unit, which we deny, can still select their representative and have complete freedom of choice, but obviously they must select a representative who can act and will act.

But the argument apparently is that the choice of the representative for collective bargaining is in the employees who desire to select the bargaining agent, and that no agreement between the employer and any other person can limit that choice and the right thereto. It is said that theirs is the right of collective bargaining—the purpose and policy of the statute is to protect it and no agreement by other persons can affect it.

But here the right of this plant protection force to select their agent for collective bargaining has been abridged and modified, not by the agreement between the employer and some person or organization foreign to them, but by an agreement between the employer and themselves acting through the International of which they are members.

The right of choice of the representative for collective bargaining has been limited and abridged by the plant protection force itself since the members of this force, when they authorized the International to act for them, and when they voted that the Amalgamated Local, the affiliate of the International, should be their bargaining agent, were members of the International and bound as members of the International by the agreements of the International.

It must be remembered that this plant protection force initiated this whole proceeding by the execution of so-called authorization cards which designated, not the Amalgamated Local, but the International, as their bargaining agent. When they became members of the International and authorized it to act for them, there was then in effect the agreement between the International and the respondent. They became members of the International and au-

thorized it to act in March, 1943. On April 6th the Amalgamated Local filed its petition for the investigation. This recites that twelve of the members of the force "had designated or selected petitioner (that is, the Amalgamated Local) to be their representative for collective bargaining." The authorization was in fact to the International. It is clear then that the members of this force were then members of the International and members of the Amalgamated Local. They were, of course, still members when later at the election they voted for the Amalgamated Local, and when that Local, affiliated with the International, was certified as having been so designated.

There can be no doubt that a labor union, when authorized by its members, may make contracts in their behalf. Through its officers it can contract or refuse to contract without consulting all of its members. *16 R. C. L.* 425.

It is true that a labor union cannot bind its individual members by contracts which affect their private rights but the contract here does not affect private rights of the members. It has to do with the precise function, the exercise of which is the inducement for membership in the union. This contract has to do with the collective bargaining and the procurement for the members of proper wages and working conditions. To accomplish that very purpose is the reason that the plant protection employees joined the International. The plant protection men, therefore, should be held bound by the agreement of the International. Even if, when they became members of the International, they had no knowledge of the existence of the contract, they then became so far an integral part of the association that they may be bound and their rights foreclosed by the authorized action of the International. This principle was applied as to corporations in the recent case of *Anderson v. Abbott,* 321 U. S. 349, and should be

applied here as against a member of an unincorporated association who is in many respects virtually a partner therein. In this *Anderson* case, it was used to charge to a stockholder a financial obligation assumed by the corporation. There is no reason why it should not cover any other contractual obligation.

It cannot be said that the members of the plant protection force cannot limit their right to select their own bargaining representatives. Collective bargaining is a right only. It is not a matter of compulsion. The statute does not impose it on an employee. It only implements a right already existing. Since the employee may or may not exercise it, he may waive it, limit it or abridge it. This is what has been done here. These employees became members of the International, which made the agreement which limited that right. They thus adopted the agreement. The agreement excluded these men from the benefits of collective bargaining by the International or its Locals. The plant protection force has therefore given up to this extent its right of choice of a collective bargaining agent.

The flagrant bad faith of the International and the Local and the position of the plant protection force, which is at least equivocal, are important factors in this discussion. The question is as to whether or not the creation of this plant protection force as a unit for collective bargaining will, under the circumstances here presented, effectuate the policies of the Act. Will it conduce "to insure to employees the full benefit of their right of self-organization and of collective bargaining and otherwise to effectuate the policies of this Act" (Section 9 (b) of the statute) to create as a unit appropriate for the purposes of collective bargaining these employees who joined the union which had agreed that it would not take them in? Will it effectuate those policies to permit that unit to select as its

bargaining agent the Local of the union that had agreed not to accept them as members or give them the benefits of collective bargaining and which, while such an agreement was in effect and while it was negotiating a new agreement with the employer including the same clauses, accepted the applications of these employees and their signed authorizations that it should act as their collective bargaining agent?

We answer that it is not by such breaches of faith that collective bargaining is promoted and effectuated.

There is no question but what the position of the International as set forth in its agreement is inconsistent with its actions and its present position. It there agreed not to accept these men as members, and then accepted them as members. It undertook that it would not give them the advantages of collective bargaining through it. It is now pressing its demand that it be permitted through its Local to act as their collective bargaining agent. Were the clauses in its contract with Federal material factors in the agreement? Did their presence there affect Federal and its actions? It has not been argued by the Board that these clauses were immaterial, or that the inconsistent position and the action of the International was not to the prejudice of Federal. Certainly the clauses were material. The agreement not to attempt to unionize all the excluded classes was an important part of the agreement and an important factor in the negotiations and must have affected to a substantial extent the decision of Federal not only as to whether it would execute the contract at all, but as well as to whether it would agree as to other clauses in the contract. The record does not indicate, and perhaps such proof would be impossible, as to whether or not any agreement would have been reached between the International and Federal if Federal had not been assured that no attempt would be made to unionize the excluded classes of

employees. But the agreement that the International would not unionize these excluded employees must have been of particular importance else it would not have been so explicitly stated.

Contracts should be enforced. Agreements solemnly made should be performed in good faith. Neither the International nor its affiliate, the Amalgamated Local, should be permitted to avoid the terms of the agreement.

B.

But there are other questions involved in this case if certiorari should be granted, which questions Federal insists should then be passed upon by this Court.

Federal has claimed throughout this case that the members of its militarized plant protection force are not employees within the Act; that they are supervisory employees and so not employees within the Act; that they are not among the classes of employees to which the Congress intended to extend the benefits of the Act; and that the enforced recognition of this Union as the collective bargaining agency of the members of its militarized plant protection force would not effectuate the policies of the Act.

CONCLUSION

Because of the foregoing Federal respectfully submits that the Board's petition for writ of certiorari should be denied.

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